

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of:)	
)	
Amendment of Section 22.949 of the)	RM-8647
Commission’s Rules to Provide for a)	
Moratorium on Acceptance of Unserved)	
Area Cellular Applications Within the)	
National Radio Quiet Zone)	

ORDER

Adopted: February 8, 2000

Released: February 9, 2000

By the Deputy Chief, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. In this Order, we address a Petition for Rulemaking (Petition) filed by Easterbrooke Cellular Corporation (Easterbrooke) and United States Cellular Corporation (USCC) (collectively, Petitioners) on May 4, 1995. Petitioners request that the Commission amend section 22.949 of its rules¹ to preclude the filing of Phase I or Phase II cellular unserved area applications that propose coverage within the National Radio Quiet Zone (Quiet Zone).² On May 24, 1995, the Commission accepted the Petition for filing and requested comments on the Petition.³ For the reasons set forth below, we deny the Petition, but on our own motion, grant Petitioners a waiver of the Commission’s cellular buildout requirements in areas where cellular construction is precluded by Quiet Zone rules.

II. BACKGROUND

2. The Quiet Zone, which encompasses an area of approximately 13,000 square miles, was created to minimize possible harmful interference to the National Radio Astronomy

¹ 47 C.F.R. § 22.949.

² See 47 C.F.R. § 1.924. Petitioners also filed a request for stay during the pendency of their Petition of the acceptance of any unserved area applications proposing Service Area Boundary coverage of any portion of the Quiet Zone.

³ See *Public Notice*, Report No. 2074 (rel. May 24, 1995). Comments were filed by Virginia RSA 6 Cellular Limited Partnership, Sprint Cellular, GTE Mobilnet, and Cellular Telephone Industry Association, all in favor of the proposed rule change.

Observatory (NRAO), located at Green Bank, West Virginia, and the Naval Radio Research Observatory (NRRO), located at Sugar Grove, West Virginia. Section 1.924(a) of the Commission's rules requires that the NRAO be notified of any proposed construction and operation of a new or modified station at a permanent fixed location within the Quiet Zone.⁴ If the NRAO objects to the proposed facility, on behalf of itself or the NRRO, the Commission, pursuant to section 1.924(a)(3) of its rules "will, after consideration of the record, take whatever action is deemed appropriate."⁵

3. Petitioners, directly or through affiliates, hold licenses to offer cellular service in several West Virginia and Virginia Rural Service Areas (RSAs) that include portions of the Quiet Zone.⁶ Petitioners argue that because the Commission typically defers to the NRAO's position, the standards employed by the NRAO to prevent or minimize possible harmful interference to the observatories have had the effect of absolutely barring placement of cellular facilities in portions of the Quiet Zone and of imposing severe restrictions on nearby facilities.⁷ As a result of this unique restriction, Petitioners argue that they have been precluded from extending coverage in portions of their RSAs.⁸ Because their ability to expand has been restricted, Petitioners contend that they should be given the first opportunity to expand their coverage if the Commission, in the future, relaxes its Quiet Zone restrictions or if new engineering techniques are developed that would permit a greater degree of Quiet Zone coverage.⁹ Petitioners therefore request that the Commission amend section 22.949 of its rules to prevent the filing by other parties of Phase I or Phase II applications in their RSAs that propose Service Area Boundaries that extend, in whole or in part, into the Quiet Zone.¹⁰ Petitioners argue that such a provision would ensure that the initial licensees in markets overlapping the Quiet Zone could take advantage of any future relaxation of the NRAO's interference protection standards or cellular technological developments which would allow improved coverage while complying with Quiet Zone restrictions.¹¹

⁴ 47 C.F.R. § 1.924(a). This provision was formerly codified at 47 C.F.R. § 22.369.

⁵ 47 C.F.R. § 1.924(a)(3).

⁶ Specifically, Easterbrooke is the non-wireline cellular licensee in West Virginia RSA 5 – Tucker. USCC is the parent company of the wireline licensees in West Virginia RSA 5 – Tucker, West Virginia RSA 3 – Monongalia, West Virginia RSA 4 – Grant, and West Virginia RSA 7 – Raleigh, and the non-wireline licensees in Virginia RSA 4 – Bedford, Virginia RSA 5 – Bath, Virginia RSA 7 – Buckingham, and West Virginia RSA 2 – Wetzel.

⁷ Petition at 3-4.

⁸ *Id.* at 7.

⁹ *Id.*

¹⁰ *Id.* at 9. Specifically, Petitioners request that section 22.949 be amended by the addition of a new paragraph, paragraph (e), which would provide as follows: "(e) Quiet Zone Provisions. Notwithstanding the provisions of section 22.949(a)-(d), no Phase I or Phase II unserved area applications for RSAs will be accepted which propose Service Area Boundaries which extend into, in whole or in part, the "Quiet Zone" described in section 22.369(a) of the Rules. Licensees of those RSAs, during their license terms, will be permitted to file applications to serve areas within the Quiet Zone in accordance with the rules applicable to system expansion during the five-year buildout period."

¹¹ *Id.*

III DISCUSSION

4. We agree with Petitioners that due to the unique circumstances encountered in the Quiet Zone, application of the cellular buildout and unserved area rules to Petitioners does not serve the purposes of those rules and is not in the public interest. Petitioners have shown that the Commission's rules governing operations in the Quiet Zone have prevented them from offering service to significant portions of their licensed areas.¹² Under these circumstances, we believe that enforcing the existing buildout and unserved area rules would serve no useful purpose and would potentially encourage the filing of speculative applications.

5. We disagree, however, that a rulemaking proceeding is the best method to address this situation. Under section 1.925 of the Commission's rules, rules associated with licenses in the Wireless Radio Services, including cellular, may be waived when (1) the underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and a grant of the requested waiver would be in the public interest; or (2) in view of unique or unusual factual circumstances, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.¹³ As discussed in the previous paragraph, these standards are satisfied here. In particular, we note that although several cellular service areas extend into the Quiet Zone, it appears from our database that few, if any, licensees other than Petitioners have substantial unserved areas within the Quiet Zone that could become subject to unserved area applications by nonincumbents under section 22.949.¹⁴ We therefore believe that a limited waiver granted to the Petitioners will sufficiently address the situation.¹⁵

6. We therefore deny the Petition, and instead grant on our own motion a limited waiver of sections 22.947 and 22.949 of the Commission's rules. Specifically, we waive sections 22.947 and 22.949 to the extent necessary to permit Petitioners to continue to construct facilities within the Quiet Zone beyond the expiration of the five-year buildout period for call signs KNKN739, KNKN640, KNKQ323, and KNKN747, and to preclude other parties from filing unserved area applications to serve areas within the Quiet Zone on the channel blocks and in the RSAs covered by these licenses. Under the terms of this waiver, Petitioners may continue to construct facilities for which they hold licenses within the Quiet Zone, notwithstanding the expiration of the five-year buildout period, subject to compliance with section 1.924(a) and other relevant provisions of the Commission's rules. In addition, facilities that Petitioners are currently operating pursuant to the special temporary authority within the Quiet Zone may be converted to full licensed status upon proper application therefor.

¹² For example, 67% of Easterbrooke's and 47% of USCC's service areas in West Virginia RSA #5 – Tucker, are currently unserved due to Quiet Zone restrictions.

¹³ 47 C.F.R. § 1.925.

¹⁴ We further note that there appear to be no substantial unserved areas within the protected zones surrounding Table Mountain, Colorado, and Arecibo Observatory, Puerto Rico. See 47 C.F.R. § 1.924(b), (d).

¹⁵ To the extent other licensees are similarly situated, we will consider separate petitions for waiver on their behalf.

7. In granting this waiver, we note that there are potential circumstances that could cause us to reevaluate the waiver granted here. For example if the Commission were to modify its Quiet Zone rules, or if technological advances were to make construction in the Quiet Zone feasible, we expect that Petitioners would take the necessary steps to expand their coverage. If they did not do so after a reasonable opportunity, we would consider reinstatement of unserved area licensing procedures to enable these parties to enter the market. Therefore, this waiver will remain in effect to permit new facilities to be constructed and brought into operation until such time as it may be terminated by the Commission or on proper exercise of delegated authority.

IV. ORDERING CLAUSES

7. Accordingly, IT IS ORDERED that, pursuant to sections 4(i) and 303(r) of the Communications Act, as amended, 47 U.S.C. §§ 154(i), 303(r), and sections 0.331 and 1.407 of the Commission's rules, 47 C.F.R. §§ 0.331, 1.407, the Petition for Rulemaking filed by Easterbrooke Cellular Corporation and United States Cellular Corporation on May 4, 1995, IS HEREBY DENIED.

8. IT IS FURTHER ORDERED that, pursuant to sections 4(i) and 303(r) of the Communications Act, as amended, 47 U.S.C. §§ 154(i), and 303(r), and sections 0.331 and 1.925 of the Commission's rules, 47 C.F.R. §§ 0.331, 1.925, a waiver of sections 22.947 and 22.949 of the Commission's rules to the extent discussed above IS HEREBY GRANTED.

9. IT IS FURTHER ORDERED that, pursuant to section 4(i) of the Communications Act, as amended, 47 U.S.C. § 154(i), and section 0.331 of the Commission's rules, 47 C.F.R. § 0.331, the request for stay filed by Easterbrooke Cellular Corporation and United States Cellular Corporation on May 4, 1995, IS HEREBY DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

James D. Schlichting
Deputy Chief, Wireless Telecommunications Bureau